BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SABINA L. BRACKETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,965
DYNAMIC EDUCATIONAL SYSTEMS, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the December 2, 2011, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Workers Compensation Board heard oral argument on March 16, 2012, in Wichita, Kansas. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

Sarah A. Mills of Pittsburg, Kansas, appeared for claimant at oral argument. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.[1] At oral argument before the Board the parties agreed that the preliminary hearing exhibits are part of the record and will be considered by the Board.

ISSUES

In his December 2, 2011, Award, ALJ Klein found claimant gave notice of her injury but failed to prove she sustained an accident arising out of and in the course of her employment. The ALJ denied claimant an award of compensation.

Claimant requests the Board overturn ALJ Klein's Award and enter an award consistent with the uncontroverted evidence presented. Claimant asserts she sustained a compensable work-related accident, a 6.5% whole body functional impairment, and a 52.5% work disability based upon a 5% task loss and a 100% wage loss.

Respondent requests the Board affirm the Award. Respondent concludes its brief to the Board in part:

> Because claimant's injury occurred as a result of an activity of day-to-day living and was a personal risk, the denial of compensation was appropriate. The Board should not give any weight to the opinion of Dr. Hendricks concerning causation, because claimant failed to reveal the existence of the extensive prior chiropractic treatment which she received, and failed to report the true nature of the accident which she sustained. Furthermore, because claimant failed to provide any evidence to the employer that her condition was work-related, claimant has failed to meet her burden in proving timely and proper notice of her injury. In the event the matter is found to be compensable, claimant is nevertheless not entitled to [an] award of permanent partial disability benefits, based upon the admissions made by Dr. Hendricks on cross-examination that he was unable to determine the percentage of functional impairment or restrictions attributable to the work injury. Under those

[1] In his Award, the ALJ did not indicate the exhibits to the preliminary hearing transcript were part of the record. The parties at page 8 of the regular hearing transcript agreed that the exhibits to the preliminary hearing would be made part of the record. The ALJ's Award indicated the parties stipulated that the date claimant met with personal injury by accident is May 4, 2009. This is an error as at page 4 of the regular hearing transcript, claimant's counsel asserts claimant suffered a repetitive series of injuries commencing May 4, 2009, through her last day worked. In his Award, the ALJ indicated that respondent admitted claimant's alleged injury arose out of and in the course of his employment. This is in error as claimant is a female and respondent's counsel at pages 4 and 5 of the regular hearing transcript denied claimant suffered a personal injury by accident arising out of and in the course of her employment. The ALJ also stated in his Award that respondent admitted notice, yet respondent indicated at page 5 of the regular hearing transcript that notice was an issue.

circumstances, an award of compensation based upon a work disability, even limited to claimant's wage loss, is inappropriate.[2]

The issues before the Board on this appeal are:

1. What is claimant's date of accident?

2. Did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent? Specifically, did claimant's injury or injuries result from a single traumatic event on May 4, 2009, or did claimant sustain a series of repetitive injuries commencing May 4, 2009, through September 21, 2009?

3. Was claimant's personal injury the result of a normal day-to-day activity and not the result of a work activity?

4. Did claimant give timely notice and meet the notice requirements imposed by K.S.A. 44-520?

5. What is the nature and extent of claimant's disability?

   a. Did claimant suffer a permanent impairment and/or restrictions?

   b. Did claimant suffer a work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent on February 23, 2009, as a career specialist. Claimant's job was based in Independence, Kansas, but required her to drive to Chanute, Kansas, twice a week to perform her job duties. She also drove to Elk and Chautauqua counties five or six times while employed by respondent. On the days claimant traveled outside of Independence, she would arrive at the Independence office in the morning and load her personal car with files and her laptop computer and then travel to her destination. She would then return to Independence by the close of business.

On May 4, 2009, claimant had loaded her automobile at Independence and then drove to Chanute. As claimant was exiting her vehicle in the parking lot outside respondent's Chanute office, she opened her car door, but could not get her legs to move and her toes were numb. She was eventually able to exit the automobile, but could not

[2] Respondent's Brief at 13-14 (filed Jan. 25, 2012).

stand up straight. Claimant felt as though she was "locked into position."[3] Claimant had a difficult time retrieving her bags from the back seat of her vehicle and carrying them to the office. In her Application for Hearing, claimant alleged that she injured her back as a result of riding in a vehicle for long periods of time and carrying a laptop computer and briefcase. She listed the date of accident as "5-4-09 and continuing to last day worked on 9-21-09."[4] Claimant worked the remainder of the day in Chanute.

When claimant returned to the Independence office, she reported the difficulty she had in getting out of the vehicle to her supervisor, Norman Chambers. Claimant told Mr. Chambers that once she exited the vehicle, she had trouble standing up, had difficulty carrying her bags to the office and had taken over-the-counter pain medication. Claimant did not ask Mr. Chambers for medical treatment, but told him that she was going to see her chiropractor that weekend.

Prior to working for respondent, claimant saw Dr. Geoffrey Hilton, a chiropractic doctor located in Joplin, Missouri. Claimant saw him every six to eight weeks for seven years before her injury on May 4, 2009.[5] He would mainly manipulate claimant so she would not have problems. Claimant described this as maintenance. After she began working for respondent, claimant saw Dr. Hilton more frequently "[b]ecause my discomfort level, I could just tell something wasn't right."[6]

Claimant underwent manipulation by Dr. Hilton on May 9, 2009, and felt better. Claimant told Dr. Hilton about the frequent travel and that her back was hurting. Claimant next saw Dr. Hilton on May 21, 2009. He told claimant travel was not good for her back. Dr. Hilton's records from the May 9 and 21, 2009, visits do not state claimant's back pain was work related. After the May 21, 2009, visit, claimant explained to Mr. Chambers what Dr. Hilton said about travel not being good for her back. Mr. Chambers recommended claimant visit a chiropractor in Independence because that chiropractor was closer than Dr. Hilton.

Claimant saw Dr. Amanda Johnson, a chiropractor in Independence, for the first time on June 5, 2009. Claimant completed a patient information sheet prior to seeing Dr. Johnson. Claimant checked "no" when answering a question on the patient information sheet which asked if her condition was due to an injury or accident. She also left a box

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[3] P.H. Trans. at 11.

[4] Application for Hearing (filed Oct. 20, 2009).

[5] P.H. Trans. at 31.

[6] *Id.*, at 15.

blank that indicated whether the injury or accident was related to auto, work, home or other.[7] Dr. Johnson's course of treatment was manipulation.

Dr. Hilton's records indicate that he saw claimant a total of eight times in 2008, but his records do not reflect what treatment he provided or what complaints claimant made during those appointments. His records reflect that claimant complained of back and neck pain on January 16, 2009. He saw claimant on two more occasions before the May 4, 2009, incident and his records indicate that claimant complained of back pain at each appointment. On April 16, 2009, claimant had driven to Emporia for training and experienced back discomfort. She then sought treatment from Dr. Hilton on April 18, 2009. At one point she got out of her automobile and walked around to ease her back discomfort. At the January 20, 2010, preliminary hearing, claimant testified that before her May 4, 2009, injuries she had back discomfort. When asked about the difference between back discomfort and pain, she stated, "[b]ack pain is what I have been experiencing for the last six to seven months where it's immobilizing."[8]

Claimant saw her family physician, Dr. Lisa Salvador, on May 21, 2009, for medical reasons unrelated to the May 4, 2009, incident. The note from that appointment does not state claimant made any complaints of back pain. Claimant saw Dr. Salvador again on August 7, 2009, because the chiropractic treatment was not relieving her symptoms. Dr. Salvador initially ordered an x-ray of claimant's back, which revealed mild apophyseal arthritis at L4 and L5, and moderate to severe disk space narrowing at L5-S1. Dr. William Garey, who reviewed the x-ray, indicated it was difficult to determine how much of the disk space narrowing was developmental and how much was degenerative.

Claimant underwent a lumbar MRI by Dr. Garey on August 13, 2009. Dr. Garey's impressions were:

> 1. L4-5 shows mild disk degeneration with mild posterior disk protrusion. There is also mild narrowing of the intervertebral foramen on the right side at this level.
> 2. L5-S1 shows more moderate disk disease along with some hypertrophy of the facets causing some narrowing of the intervertebral foramina, more so on the right side.[9]

After receiving the MRI results, Dr. Salvador referred claimant to Dr. Bradley S. Davis, who initially saw claimant on September 28, 2009. Claimant related the May 4, 2009, incident to Dr. Davis. She admitted that Dr. Davis' records from the September 28, 2009, appointment were the first documentation from a physician that her back pain was

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[7] *Id.*, Cl. Ex. 2.

[8] *Id.*, at 33.

[9] *Id.*, Cl. Ex. 1.

work related. Claimant indicated she got out of her car attempting to carry some work supplies when she felt an "acute onset lumbar back pain with radiating symptoms into the right lower extremity of the foot."[10] His impressions were similar to those of Dr. Garey. However, Dr. Davis indicated claimant also had lumbar spondylosis and associated quadratus lumborum and paraspinal muscle spasm.

Dr. Davis gave claimant three epidural injections and prescribed physical therapy three times a week as well as muscle relaxant and anti-inflammatory medications. Dr. Davis noted claimant had a past medical history of chronic cervical neck pain, chronic lumbar back pain and right lower extremity numbness and tingling. Claimant testified she last saw Dr. Davis on September 23, 2010. At that time he gave her restrictions of no repetitive bending, twisting or lifting.

In June 2009, claimant spoke to Paula Sevart, respondent's operations manager. Claimant indicated she asked Ms. Sevart if a new career manager was going to be hired as claimant's back was not doing well because of the traveling and carrying. Apparently once a new career manager was hired, claimant's travel would be decreased. Claimant testified that she never completed an accident report because she did not fall and break something. Claimant also testified that she was never told by anyone that she needed to complete an accident report.

At the regular hearing, claimant testified that prior to the May 4, 2009, incident she led a very active life. When asked if she had problems with her lower back, she stated, "No, I mean I did just about anything and everything that I wanted to do."[11] She and her husband took road trips to California, Pennsylvania, St. Louis, Hannibal, Branson and Kansas City. They also traveled, canoed three times a month from June to September, and completely remodeled their home, doing the work themselves. In September 2010, claimant and her husband attempted another road trip to California. They drove as far as Fredonia, Kansas, and canceled the trip because claimant's toes went numb. Claimant was terminated on September 21, 2009, because she could not fulfill her job duties and has not worked since.

At the request of her attorney, claimant was examined by Dr. Randall L. Hendricks, an orthopedic specialist in Tulsa, Oklahoma, on March 26, 2010. He reviewed the MRI and the reports of Drs. Davis and Salvador. Dr. Hendricks' report indicates he was aware that claimant had seen a chiropractor prior to May 4, 2009, but does not indicate that he reviewed the chiropractic records of Drs. Hilton and Johnson.

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[10] *Id.*, Cl. Ex. 4.

[11] *Id.*, at 24.

Dr. Hendricks' impression was that claimant "did sustain an on-the-job injury which appears to have been an accumulative trauma situation."[12] He indicated claimant had a preexisting L5-S1 degenerative disk that was aggravated by on-the-job activities. He believed that most of her symptoms emanated from the L5-S1 disk and that the L4-5 disk may have played a minor role. Dr. Hendricks opined claimant had reached maximum medical improvement and pursuant to the *Guides*[13] had a 6.5% impairment to the body as a whole as a result of her lumbar condition. Dr. Hendricks used the Range of Motion model rather than the DRE method. In his opinion, it is better to use the Range of Motion model when there is radiculitis that has resolved and the patient is asymptomatic. He assigned claimant restrictions of lifting no more than 35-40 pounds and no repetitive bending and twisting from the waist.

Dr. Hendricks testified he was told by claimant that she sustained an injury at work on May 4, 2009, but that claimant did not state there was a specific event that caused her injury. He also indicated claimant did not mention the incident in April 2009 when she had back discomfort while driving and had to stop and walk around. He testified he was unaware claimant had received chiropractic treatment every six to eight weeks for seven years prior to the accident, as those records were not provided to him, nor did claimant tell him about her prior chiropractic treatment. However, his notes state: "Says she's done 'maintence" *[sic]* DC tx. for ~8 yrs. for spine/knee & CTS."[14]

The following testimony was elicited from Dr. Hendricks about the effect of not knowing a patient's complete medical history upon his opinions:

> Q. (Mr. McCurdy) Without an accurate history of injury and accurate history of any prior complaints, are you able to accurately assess what portion of your permanent impairment rating relates to the injury and what portion may be preexisting?
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> A. (Dr. Hendricks) You're correct.
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> Q. And when the patient gives you a history that she has no prior lumbar problems, then you're going to accept that history as accurate and assess all of the permanent impairment to the current injury. Would you agree with that?
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> A. Yes, sir.
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> Q. And if the patient had treatment for past lumbar problems, then that might affect your opinion on apportionment?

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[12] Hendricks Depo., Ex. 2.

[13] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[14] Hendricks Depo., Ex. 2.

A. Yes.

Q. And it might affect your opinion on the restrictions that may be necessary as a result of the injury?

A. Perhaps.

Q. And going one step further than the tasks -- that would also affect your opinion on the tasks that she can or cannot perform that she had performed in the 15 years before her injury?

A. You're correct.[15]

Jerry D. Hardin, a personnel consultant/human resources consultant, interviewed claimant by telephone about the job tasks she performed in the 15 years prior to May 4, 2009. He also reviewed the medical report of Dr. Hendricks. Mr. Hardin determined claimant had performed 84 job tasks in the 15 years before May 4, 2009. Dr. Hendricks opined that following her accident, claimant could no longer perform 3 of 60 non-duplicative job tasks for a 5% task loss.

The ALJ determined that claimant gave notice of her injury on May 4, 2009, which means claimant gave timely notice of her injury to respondent. The ALJ found that claimant failed to prove "that she sustained an accident that arose out of and in the course of her employment."[16] Claimant appeals and asks the Board to find that she suffered personal injury by accident arising out of and in the course of her employment with respondent, that she suffered a 6.5% permanent impairment to the body as a whole, and a 52.5% work disability. Claimant requests the ALJ's finding on timely notice be affirmed. Respondent requests the ALJ's Award be affirmed in its entirety, except on the issue of timely notice.

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[17] K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[15] Hendricks Depo. at 11-12.

[16] ALJ Award (Dec. 2, 2011) at 3.

[17] K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[18] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[19] The existence, nature and extent of the disability of an injured workman is a question of fact.[20] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[21] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[22]

K.S.A. 2009 Supp. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

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[18] K.S.A. 2009 Supp. 44-501(a).

[19] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[20] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[21] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[22] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

In *Martin*,[23] claimant pulled into the parking lot at the school where he worked and described the incident where he sustained an injury as follows: "'And as I started to get out, I unlocked the door, I twisted. And as I started to get out, there was a sudden sharp pain come from my back down the left leg and I caught myself and pulled myself back into the truck, shut the door with a lot of pain and sat there for a few minutes.'"[24] The Kansas Court of Appeals held as follows:

> In applying these rules, it is clear from the facts presented by this case that the risk involved in claimant's accident was not associated with his employment and cannot be construed as a neutral risk, but must be considered a personal risk. We agree with the respondent's assertion that neither the claimant's vehicle nor the condition of the premises had anything to do with the injury. There were no intervening or contributing causes to the accident except for claimant's own actions in exiting from the truck. Considering the history of claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his condition, *i.e.*, bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip. This is a risk that is personal to the worker and not compensable.
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> Where, as here, it cannot be said that the circumstances surrounding the claimant's injury exhibit any causal connection to his employment, we hold that the trial court properly concluded that compensation should be denied for the May 28, 1976, injury.[25]

In *Johnson*,[26] claimant was in her office when she injured her left knee as she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. The Kansas Court of Appeals held, "Considering the facts of this case, we do not find substantial evidence to support the Board's finding that Johnson's act of standing up was *not* a normal activity of daily living."[27]

The Kansas Supreme Court discussed at length the definition of a normal activity of daily living in *Bryant*.[28] The claimant in *Bryant* injured himself while reaching for his tool belt and twisting to work on some equipment. The Court found claimant's injury was work

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[23] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[24] *Id.*, at 298.

[25] *Id.*, at 300.

[26] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[27] *Id.*, at 789.

[28] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

related and rejected the employer's argument that claimant was injured while engaged in a normal activity of daily living. The Court cited *Martin*, *Johnson* and numerous other cases in which claimant's injury was allegedly caused by a normal activity of daily living. The Court stated:

> We cannot discern a consistent principle in these various opinions. Certainly, no bright-line rule emerges from analysis of these cases or from the plain language of the statute. To be sure, twisting or bending over are daily activities, for workers as well as nonworkers. So are lifting objects, cutting pieces of meat, typing on keyboards, and walking and standing for extended periods of time. The Court of Appeals' opinion in the present case tends to remove from the purview of workers compensation protection the many work-related ailments that follow from activities that may also be carried out away from the job.
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> . . . .
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> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–]bending, twisting, lifting, walking, or other body motions[–]but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[29]

ANALYSIS

The ALJ's Award indicates the parties stipulated that the date of accident was May 4, 2009. The Award does not address claimant's allegation that she suffered an injury caused or aggravated by repetitive work activities. Claimant asserts that she was injured on May 4, 2009, and continuing until her last day of work on September 21, 2009. She testified that after May 4, 2009, traveling and carrying bags caused her pain. Claimant testified that in June 2009 her back was not doing well because of travel and carrying and she told this to Ms. Sevart. Claimant received chiropractic and medical treatment from May 4, 2009, until she was discharged from her job on September 21, 2009. During that time period claimant continued performing her regular job duties. The Board finds that claimant proved by a preponderance of the evidence that she suffered a back injury that was caused or aggravated by repetitive work activities commencing May 4, 2009, and continuing until her last day of work on September 21, 2009.

K.S.A. 2009 Supp. 44-508(d) states the earliest date of accident for a series of microtraumas is the date an authorized physician took claimant off work or provided restrictions. However, claimant was never seen by an authorized physician. Therefore,

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[29] *Id.*, at 595-596.

according to K.S.A. 2009 Supp. 44-508(d), claimant's date of accident is the earlier of: (1) the date she gave written notice to respondent of her injury, or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. No evidence was presented that it was communicated in writing to claimant by a physician that her back condition was work related. Accordingly, the Board finds that claimant's date of accident was October 20, 2009, the date she filed her Application for Hearing with the Division of Workers Compensation.[30]

ALJ Klein found claimant failed to prove that she sustained an accident that arose out of and in the course of her employment with respondent. The Board disagrees. Claimant testified that prior to May 4, 2009, she was essentially symptom-free. Her back continued to worsen as a result of travel and carrying bags. Dr. Hendricks opined claimant sustained an on-the-job injury which was an accumulative trauma situation.

Respondent argued, and the ALJ agreed, that Dr. Hendricks' opinion is not reliable, primarily because Dr. Hendricks was unaware of claimant's chiropractic treatment prior to May 4, 2009. However, Dr. Hendricks did not indicate he would have changed his opinion on causation had he known about claimant's history of prior chiropractic treatment. He testified knowing claimant's prior medical treatment is important. However, after being informed of claimant's extensive history of chiropractic treatment before May 4, 2009, Dr. Hendricks was never asked if his opinion on causation had changed. The Board finds the testimony of claimant and Dr. Hendricks supports a finding that claimant suffered a back injury by accident arising out of and in the course of her employment with respondent. Furthermore, Dr. Hendricks' records reflect that claimant did inform him of her history of chiropractic treatment. Apparently, Dr. Hendricks forgot this fact when he gave his deposition testimony.

Respondent argues the incident on May 4, 2009, was a normal activity of day-to-day living and cites the *Martin* case. In *Martin*, claimant had just arrived at work and had not engaged in any work activities when he suffered an injury while exiting his vehicle. Here, claimant was engaged in a work activity of driving to another work location when she suffered a back injury while attempting to exit her vehicle. Respondent's argument ignores the fact claimant's repeated travel and carrying bags after May 4, 2009, continued to aggravate her back condition.

In the recent case of *Bryant*, the Kansas Supreme Court appears to have altered its focus in claims where a respondent asserts an employee was injured at work while engaged in a normal activity of day-to-day living. The Court in *Bryant* indicated that the fact finder cannot look just at the isolated activity the worker is performing when injured,

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[30] Claimant's attorney sent a Letter of Intent to respondent by certified mail dated October 19, 2009. The return receipt from the U.S. Postal Service indicated that respondent received the Letter of Intent on October 21, 2009.

but must look at the overall context in which the worker is performing the activity. Here, travel and carrying work supplies and a laptop were an integral part of claimant's job duties. She traveled twice a week to Chanute and on other occasions to various locations. During her travels, she was required to bring her laptop and files, which she carried herself. The Board finds that claimant's injury was not the result of normal activities of day-to-day living.

The Board finds claimant gave timely notice of her accident. Respondent alleges that although claimant notified Mr. Chambers of a sore back on May 4, 2009, claimant did not provide any information with respect to the time, place and particulars of the accident. The Board determined above that claimant's date of accident is October 20, 2009. Claimant's Application for Hearing filed on the same day provides timely notice and includes requisite information required by K.S.A. 44-520.

Dr. Hendricks testified that claimant has a 6.5% permanent impairment to the body as a whole as a result of her low back injury and assigned permanent restrictions. Claimant testified that her symptoms have worsened and listed a number of activities she can no longer engage in. On September 21, 2009, claimant was discharged by respondent and is unemployed. Consequently, claimant asserts she has suffered a 100% wage loss. Dr. Hendricks opined claimant has a 5% task loss, which averaged with a 100% wage loss equates to a 52.5% work disability.

No evidence was presented by respondent to contradict the opinions of Dr. Hendricks. Uncontradicted medical testimony unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.[31] The Board is mindful that Dr. Hendricks testified that he was unaware of claimant's history of chiropractic treatment. However, there is no evidence that Dr. Hendricks' opinions as to causation or claimant's functional impairment, work restrictions, and task loss changed after learning (or being reminded) that claimant had a history of chiropractic treatment predating May 4, 2009. Therefore, the Board finds claimant has a 6.5% permanent impairment to the body as a whole as a result of her low back injury; and a 5% task loss and a 100% wage loss, which averaged equates to a 52.5% work disability.

CONCLUSION

1. Claimant's date of accident is October 20, 2009. Claimant's back injury was the result of a series of repetitive injuries each and every working day through September 21, 2009.

2. Claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent. Claimant's personal injury was the result of work activities and not a normal activity or activities of day-to day living.

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[31] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

3. Claimant met the notice requirements imposed by K.S.A. 44-520.

4. Claimant has a 6.5% permanent functional impairment to the body as a whole. Claimant suffered a 100% wage loss. Claimant has permanent restrictions which resulted in a 5% task loss. Averaging the wage loss and task loss results in a 52.5% work disability for claimant.

AWARD

WHEREFORE, the Board reverses in part and affirms in part the December 2, 2011, Award entered by ALJ Klein.

The Board finds claimant sustained personal injury by accident on October 20, 2009, arising out of and in the course of her employment.

Claimant gave timely notice to respondent of the accident.

Sabina L. Brackett is granted compensation from Dynamic Educational Systems, Inc., and its insurance carrier for an October 20, 2009, accident and resulting disability. Based upon an average weekly wage of $600.00, Ms. Brackett is entitled to receive 217.88 weeks of permanent partial general disability benefits at $400.02 per week, or $87,156.36, for a 52.5% permanent partial general disability. The total award is $87,156.36.

As of April 18, 2012, Ms. Brackett is entitled to receive 130.14 weeks of permanent partial general disability compensation at $400.02 per week in the sum of $52,058.60, for a total due and owing of $52,058.60, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $35,097.76 shall be paid at $400.02 per week until paid or until further order of the Director.

Claimant is entitled to have paid as authorized all reasonable and necessary medical expenses she incurred for her injuries resulting from her October 20, 2009, accident.

Future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's contract for attorney fees is approved insofar as it does not violate provisions of K.S.A. 44-536.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER PRO TEM

DISSENT

Claimant failed to prove by a preponderance of the evidence that she sustained a personal injury by accident arising out of and in the course of her employment with respondent. Claimant received regular chiropractic treatment to her back for seven years prior to the incident on May 4, 2009. Dr. Hendricks' opinion as to causation is problematic. Dr. Hendricks testified he was unaware of claimant's prior chiropractic treatment. Yet a note in his records indicates claimant had received 8 years of chiropractic treatment prior to seeing him. He was unaware of the incident in April 2009 when claimant's back hurt and she exited her vehicle and walked around to ease the pain. Claimant told Dr. Hendricks she hurt herself on May 4, 2009, but did not state there was a specific event that caused the injury. Although Dr. Hendricks' opinion on causation may be uncontroverted, it is unreliable and untrustworthy because he did not have all the facts concerning how claimant was injured.

Claimant apparently did not tell any chiropractor or medical provider that she had a work-related injury until September 28, 2009, when she told Dr. Davis. Between May 4, 2009, and August 7, 2009, claimant saw Drs. Hilton, Johnson and Salvador, yet their records do not reflect claimant told them of a work-related injury. Nor did claimant testify that she told any chiropractor or medical provider of a work-related injury until September 28, 2009.

Claimant testified she injured her back when she had back pain on May 4, 2009, and had difficulty getting out of the car. Dr. Davis' records indicate claimant's injury occurred on May 4, 2009, when she exited her vehicle and attempted to carry some work supplies. Dr. Hendricks' report indicates claimant injured herself on May 4, 2009, but there

was no specific event. Claimant's explanations of how she suffered her back injury are not consistent.

Claimant asserts she was injured on "5-4-09 and continuing to last day worked on 9-21-09."[32] However, claimant provided insufficient evidence that travel and carrying her laptop and work supplies aggravated her back condition. Claimant would drive her own vehicle from Independence to Chanute twice a week. She was required to bring her laptop and work supplies. She traveled elsewhere a total of five or six times during the 7-month period she worked for respondent. Claimant provided no specifics as to how these activities aggravated her back condition, other than a blanket statement that travel and carrying bothered her back. No evidence was presented as to the weight of the items claimant carried or what aspect of traveling caused her back problems. The greater weight of the evidence indicates that claimant's back problems were the result of a single event on May 4, 2009, and were not caused or aggravated by repetitive activities.

The May 4, 2009, event was a normal activity of day-to-day living. The dissent is cognizant of the language of *Bryant* which is set out above. However, *Bryant* does not eradicate the rule that if an employee is injured while engaged in a normal activity of day-to-day living, that injury is deemed not work related and, thus, not compensable. In *Bryant*, the injured worker was reaching for a tool belt. Here, claimant was simply exiting her vehicle and was not engaged in a work activity.

The facts in the present claim are nearly identical to those in *Martin* and *Freed*.[33] In *Freed*, claimant worked for respondent as a van/bus driver transporting troops from Fort Riley to and from training sites and airports. As claimant was exiting a 15-passenger van from a back seat, he was not able to stand up and exit normally out of the van. He had to turn to the right, bend over from the waist, and slide off the seat to the ground. When his feet touched the ground, claimant propelled himself upright. As he did so, he felt a twinge in his lower back on the left side that radiated into his buttock and down his left leg. Claimant also had a history of prior back problems. A Board Member held the activity of exiting a passenger van was an activity of day-to-day living as contemplated by K.S.A. 2010 Supp. 44-508(e).

To summarize, the dissent would find claimant suffered an alleged back injury during a single incident on May 4, 2009; claimant failed to prove by a preponderance of the evidence that she suffered a back injury resulting from a single traumatic event on May 4, 2009, or from a series of repetitive work activities, arising out of and in the course of her

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[32] Application for Hearing (filed Oct. 20, 2009).

[33] *Freed v. Eagle Support Services, Inc.*, No. 1,052,101, 2011 WL 800436 (Kan. WCAB Feb. 25, 2011).

employment with respondent; and the activity which resulted in claimant's injury, exiting her vehicle, was a normal activity of day-to-day living.

BOARD MEMBER

BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
lori@spigarelli-law.com

Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
cmccurdy@wallacesaunders.com

Thomas Klein, Administrative Law Judge